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ATTORNEY FOR APPELLANT:

**THOMAS W. VANES**  
Office of the Public Defender  
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**RICHARD C. WEBSTER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TWIN OSBORNE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0510-CR-610
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE LAKE SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 3  
The Honorable Joan Kouros, Judge  
Cause No. 45G03-0206-MR-00004

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**August 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Appellant, Twain Master Osborne, pleaded guilty to Voluntary Manslaughter, a Class A felony. Upon appeal, Osborne argues that the trial court abused its discretion in sentencing him to the presumptive term of thirty years imprisonment.

We affirm.

The record reveals that on or about June 11, 2002, in Gary, Indiana, Lelon “Eddie” Lomax and Glenn Ware were sitting on the front porch of a home when Osborne came around the side of the house, yelled a name indicating that he was looking for that particular person, and immediately started shooting. As a result, Eddie Lomax was shot and killed and Glenn Ware was injured.

On June 13, 2002, the State charged Osborne with murder and attempted murder. On March 11, 2004, the State filed an amended information charging Osborne with voluntary manslaughter as a Class A felony. That same day, Osborne entered into a plea agreement wherein he agreed to plead guilty to voluntary manslaughter.<sup>1</sup> The terms of the plea agreement allowed the parties to argue as to an appropriate sentence.

A sentencing hearing was held on June 24, 2004. During the hearing, evidence was received that the victim, Eddie Lomax, was “slow” or mildly mentally disabled and that he was not Osborne’s intended victim. Osborne argued as mitigating that he was remorseful, that he was only nineteen years of age (at the time of sentencing), that he had

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<sup>1</sup> The amended information, filed March 11, 2004, did not purport to add a third count alleging voluntary manslaughter. Rather, the amended information alleged only one crime, voluntary manslaughter. The stipulated plea agreement, also filed March 11, 2004, stated that Osborne “is currently charged . . . with Count I, Murder and Count II, Attempted Murder . . . .” Appendix at 50. It appears that the filing of the amended information contemplated a guilty plea. Nevertheless, when the amended information was filed, the murder and attempted murder charges became no longer pending. See Woodsmall v. State, 89 Ind.App. 617, 167 N.E. 631 (1919).

no felony or misdemeanor convictions, that he had pleaded guilty to save Lomax’s family the trauma of trial, and that he did not intend to kill Lomax. Osborne asked the trial court to impose a sentence less than the presumptive. The State argued as aggravating circumstances that Osborne admitted gang affiliation with the Vice Lords street gang,<sup>2</sup> that Lomax was mildly mentally disabled, and that to mitigate the presumptive sentence would depreciate the seriousness of the crime. The State requested that an aggravated sentence be imposed. After considering the evidence and arguments of counsel, the trial court found one aggravator—that Lomax was mildly mentally disabled, and one mitigator—that Osborne had no prior convictions. The trial court then imposed the presumptive sentence of thirty years imprisonment. See Ind. Code § 35-50-2-4 (Burns Code Ed. Repl. 2004).<sup>3</sup> On October 20, 2005, Osborne received the trial court’s permission to file this belated appeal.

Upon appeal, Osborne contends that the trial court abused its discretion in finding the victim’s mental infirmity to be an aggravating circumstance. Osborne maintains that the mental infirmity should not have been considered significant because the impairment was minor and it had no bearing in any manner on this offense. Osborne further argues

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<sup>2</sup> In setting forth gang affiliation as an aggravator, the State referenced the pre-sentence investigation report, noting that Osborne admitted to his probation officer that he had been affiliated with the Vice Lord street gang since he was fifteen. Osborne, however, did not include a copy of the pre-sentence investigation report in his appendix and it is not included in the record on appeal. We note that during his argument, counsel for Osborne asserted that Osborne was not affiliated with any street gang.

<sup>3</sup> The amended version of this statute, effective April 25, 2005, references the “advisory” sentence rather than the “presumptive” sentence, reflecting the changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004), reh’g denied. See Ind. Code § 35-50-2-4 (Burns Code Ed. Supp. 2006). Since Osborne committed the crime in question and pleaded guilty thereto before the effective date of the amendments, we apply the version of the statute then in effect and use the term “presumptive sentence.” See Weaver v. State, 845 N.E.2d 1066, 1071-72 (Ind. Ct. App. 2006), trans. denied.

that even if the victim's mental infirmity was a proper aggravator, its marginal nature was clearly outweighed by the mitigator identified by the court—lack of criminal convictions. Based upon the forgoing, Osborne requests that we reduce his sentence to a term of years below the presumptive.

We begin by noting that sentencing decisions are within the sound discretion of the trial court. Gaspar v. State, 833 N.E.2d 1036, 1044 (Ind. Ct. App. 2005), trans. denied. In imposing the presumptive sentence, the trial court is not required to identify aggravating or mitigating circumstances or state its reasons for imposing the presumptive sentence. Id. at 1044-45. However, if the trial court does find aggravating and mitigating circumstances, concludes that they balance, and thus imposes the presumptive sentence, then the trial court must provide a statement of its reasons for imposing the presumptive sentence. Id. at 1045 (citing Ind. Code § 35-38-1-3 (Burns Code Ed. Repl. 1998)). The trial court's determination of the proper weight to be given aggravating and mitigating circumstances, and the appropriateness of the sentence as a whole, is entitled to great deference and will be set aside only upon a showing of a manifest abuse of discretion. Dunlop v. State, 724 N.E.2d 592, 597 (Ind. 2000).

Pursuant to Indiana Code § 35-38-1-7.1(b)(6) (Burns Code Ed. Repl. 1998), the trial court is permitted to consider as an aggravating circumstance that the victim of the crime “was mentally or physically infirm.” Here, the trial court did just that. Eddie Lomax was a forty-three-year-old man who lived with and took care of his parents. His family described him as “slow in his mentality” and noted that he was “a sharp person, just slow.” Transcript at 7, 25. Because of his kind nature, Eddie Lomax had no

enemies. We acknowledge that the fact that Eddie Lomax was “slow” or mildly mentally disabled was not a significant factor in his death in that the evidence reveals that he was simply in the wrong place at the wrong time. Nevertheless, such does not mean that the victim’s mental infirmity was irrelevant to the court’s consideration of aggravating circumstances. Here, as an aggravator, it was the fact that the victim was mildly mentally disabled. We cannot say that the trial court abused its discretion in considering the victim’s mental infirmity as an aggravating circumstance.

After finding one aggravator and one mitigator, the trial court imposed the presumptive sentence. Implicit in the court’s sentencing statement is that the court found that the aggravator and mitigator balanced. This was within the trial court’s discretion. Based upon the record before us, we cannot say that the trial court abused its discretion in deciding that the presumptive term of thirty years for a Class A felony was appropriate.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.